PD-0163-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0163-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
6/9/2017
ABEL ACOSTA, CLERK

COBY RAY HUDGINS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Gregg County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant, Coby Ray Hudgins.

* The trial Judge was the Honorable Alfonso Charles, 124th Judicial District Court of Gregg County.

* Trial counsel for the State was Christopher Botto and Chris Parker, 101 East Methvin Street, Suite 333, Longview, Texas 75601.

* Counsel for the State at the motion for new trial hearing were Christopher Botto and Zan Colson Brown, 101 East Methvin Street, Suite 333, Longview, Texas 75601.

* Counsel for the State on appeal was Zan Colson Brown, 101 East Methvin Street, Suite 333, Longview, Texas 75601.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellant at trial was R. Daryll Bennett, P.O. Box 2645, 322 West Whaley, Longview, Texas 75606.

* Counsel for Appellant on the motion for new trial and appeal were Lance R. Larison, P.O. Box 232, Longview, Texas 75606 and J. Brandt Thorson, P.O. Box 3768, Longview, Texas 75606.

* Counsel for trial counsel R. Daryll Bennett present at the motion for new trial hearing was Ebb Mobley, 422 North Center Street, P.O. Box 2309, Longview, Texas 75606.

INDEX OF AUTHORITIES

Cases

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TO THE COURT OF CRIMINAL APPEALS

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COBY RAY HUDGINS, Appellant

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A conclusory record on motion for new trial cannot support a finding of ineffective assistance of trial counsel for failure to call an expert witness. To show deficient performance, the complaining party must essentially assume the role of trial counsel and present sufficiently specific, admissible evidence. Anything less is hypothetical, and the weighty consequences that an attorney may suffer demand much more than some manufactured justification by an appellate court.

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument, and the Court did not grant argument.

STATEMENT OF THE CASE

Appellant was convicted of murder and sentenced to ninety-nine years' imprisonment. He filed a motion for new trial, claiming that his trial attorney rendered ineffective assistance for not investigating and requesting a forensic psychologist/psychiatrist to testify about his history as a sex-abuse victim for mitigation purposes at punishment. The trial court denied the motion. Despite Appellant's failure to present any evidence of how the abuse affected him in relation to the offense or otherwise or that the evidence would be admissible, the court of appeals held that counsel rendered ineffective assistance.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed the trial court's denial of Appellant's motion for new trial and remanded for a new punishment hearing. *Hudgins v. State*, No. 12-15-00153-CR, 2017 Tex. App. LEXIS 597 (Tex. App.—Tyler Jan. 25, 2017) (not designated for publication). The State did not file a motion for rehearing. The State's petition was granted on May 24, 2017.

ISSUE PRESENTED

Is it error to declare trial counsel ineffective for failing to investigate and present evidence when, at the motion for new trial hearing, Appellant presented no evidence demonstrating that the investigation and additional evidence would have been beneficial?

SUMMARY OF THE ARGUMENT

A trial attorney's livelihood and security should not be collateral damage to a claim of ineffective assistance that is unsupported by any individualized evidence. The court of appeals erred to hold that Appellant's trial counsel was ineffective according to its hypothetical understanding of the utility of the evidence presented at the motion for new trial hearing. Appellant's expert presented only general information lacking significance to this case; any materiality of Appellant's medical history is unknown. This Court should reverse and reinstate Appellant's ninety-nine-year sentence.

FACTS

Appellant shot K.W. in the face during a night of heaving drinking with family and friends at his home. 5 RR 31-50; 6 RR 147-68. He was charged with murder. 5 RR 18.

At a pretrial hearing on his request for an expert to determine competency and insanity, Appellant's counsel stated he believed that the issues concerning

Appellant's state of mind were nuanced. 2 RR 4-7. He explained that Appellant's having been sexually molested by his cousin may shed light on his decision to have guns and his general fearfulness. 2 RR 4-7. He was uncertain of the specifics behind the theory and wanted the opportunity to explore the matter. 2 RR 4-7. The trial court appointed an expert to assess competency and sanity but stated that, if the defense wanted another expert for a different purpose, it would need to petition the court. 2 RR 7. Counsel did not request a second expert.

At trial, maintaining that he did not know the gun was loaded, Appellant testified that the shooting was an accident. 6 RR 165-67, 180. Though Appellant argued he was guilty of manslaughter for having acted recklessly, the jury convicted him of murder. 6 RR 228-34, 248.

At punishment, Appellant's great-uncle, father, and grandmother testified. Appellant's father said that Appellant had been sexually molested by a cousin and that Appellant had testified against his cousin. 7 RR 25-28. The cousin had been released from prison about ten months before the shooting and had allegedly threatened Appellant. 7 RR 26-30. Appellant's father and grandmother testified that the sexual abuse had been hard on Appellant and the whole family. 7 RR 26-28, 35. The jury sentenced Appellant to ninety-nine years' imprisonment. 7 RR 63.

Appellant filed a motion for new trial claiming, among other things, that

defense counsel was ineffective for failing to request a court-appointed expert to mitigate punishment based on the fact he was sexually abused as a child. 1 CR 76-87. The court of appeals accurately summarized the substance of the proceeding:

> Wade French, a forensic psychologist, testified regarding the nature of the ex parte assistance a forensic psychiatrist or psychologist could provide a defendant who had been sexually abused. He related how the stress from a traumatic event like sexual abuse typically affects the victim's life and conduct, and that it especially affects the victim's reaction to future stress or stimuli. It was Dr. French's opinion that a forensic psychiatrist or psychologist, after evaluating the sexually abused defendant, could then explain in depth the life altering effects of such trauma to the jury. This, he believed, was especially relevant in mitigating a defendant's moral blameworthiness and in aiding the jury to more accurately assess an appropriate sentence.
>
> His attorney never contacted the Buckner Center where Appellant was counseled and treated following his sexual assault. Nor did his attorney talk to Dr. Mark Miller in Kilgore who treated him following the homicide. Appellant testified that his attorney never talked to him about speaking to his doctors, nor did he get him to sign releases for his medical records.
>
> Appellant told the court that his attorney told him he was investigating the possibility of a 'Bernie Tiede defense,'[1] and that he would try to get the State to pay for 'Dr. Gripon.' However, after the hearing on competency and sanity, his attorney never again discussed the matter with him.

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[1] Tiede was granted a new punishment hearing based on evidence that he had been sexually abused because Dr. Gripon had testified at trial that Tiede had an unremarkable mental health history. *Ex parte Tiede*, 448 S.W.3d 456, 460 (Tex. Crim. App. 2014) (Alcala, J., concurring).

Appellant's counsel testified that he was only vaguely aware of the possibility of the court appointing a forensic expert to give ex parte assistance to indigent defendants. He remembered that he gave Dr. Gripon's telephone number to Appellant's father telling him 'y'all can have it done if you want to. The judge is not going to pay for it [a forensic psychologist or psychiatrist to assist the defense].' Then counsel added, '[N]ow, I never heard any more from it.' He made no further effort to seek appointment of an expert to assist the defense in producing mitigation evidence on Appellant's behalf during punishment if needed.

. . .

Buck Files, an attorney who is board certified in criminal law, testified regarding the 'Performance Guidelines for Non-Capital Criminal Defense Representation' promulgated by the Texas Court of Criminal Appeals and adopted by the State Bar of Texas . . . .

Files believed that counsel's most serious failure was in not requesting ex parte forensic psychological or psychiatric assistance to assist in the development of mitigating evidence at the punishment stage. Instead, counsel asked the court to appoint its own expert to conduct a competency and sanity examination although there was no real question of Appellant's competence or sanity. According to Files, this demonstrated counsel's ignorance of well-established, relevant case law. Given counsel's knowledge of Appellant's sexual abuse, counsel's failure to procure ex parte assistance was, Files believed, performance below that of constitutionally effective counsel. A forensic psychologist could have explained to the jury in depth how the prior sexual abuse affected Appellant's life and actions.

. . .

Files testified that it did not appear from counsel's file that counsel had obtained relevant information concerning Appellant's background and personal history, employment history and skills, education, or medical history and condition in preparation for sentencing. Nor did counsel attempt to obtain releases in order to obtain Appellant's medical records. Files considered counsel's almost total failure to investigate

> and pursue every avenue that could lead to mitigating evidence to be ineffective representation at the punishment stage of the trial.

Hudgins, 2017 Tex. App. LEXIS 597, at *3-8; 8 RR 4-33; 9RR 5-100.

ARGUMENT

To prove ineffective assistance of counsel, a person must demonstrate that (1) counsel's conduct "fell below an objective standard of reasonableness," and (2) counsel's incompetence prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). When assessing the reasonableness of an attorney's investigation, a reviewing court must consider the quantum of evidence already known to counsel and whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "'[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Id*. at 522-23 (quoting *Strickland*, 466 U.S. at 690-691).

Ineffective assistance for failure to call an expert witness cannot be established until it is shown that the witness was available and would have testified favorably for the defense. *See Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) (citing

King v. State, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983)) ("Counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony."); *see also Ex parte Ramirez*, 280 S.W.3d 848, 853-54 (Tex. Crim. App. 2007) (per curiam) (Applicant failed to show that testimony of uncalled witnesses would have been favorable); *Ex parte Flores*, 387 S.W.3d 626, 638 (Tex. Crim. App. 2012) (that an expert could have given "some benefit" is not the proper prejudice standard).

Each complaint lodged by Appellant and pointed to by the court of appeals fails because the information required to properly assess counsel's performance is incomplete. Holding an attorney ineffective based on an unsupported, imaginary theory predicated on absent evidence is unfair.

1. Dr. French's testimony is meaningless.

Dr. French testified about how prior sexual abuse can affect a victim's life, conduct, and reaction to stress and stimuli and therefore be pertinent to moral culpability and punishment mitigation. First, Dr. French did not state that he was available to testify at Appellant's punishment hearing. *See King*, 649 S.W.2d at 44 (witness availability must be shown). Second, Dr. French's own testimony proves that the record is insufficient to determine favorability. He laid out the information

he would need, but did not have, to conduct a proper mental-health assessment of Appellant. *See* 8 RR 20-21 (assessment of PTSD), 23-25 (risk assessment of violence/future dangerousness), 25-30 (admitting he knows nothing specific to Appellant). The basic missing information needed from Dr. French to measure counsel performance includes: (1) the type of abuse; (2) the extent and duration of abuse; (3) the lasting impact, if any, of the abuse on Appellant, physically and mentally; (4) whether the abuse has any relationship to Appellant's conduct in killing his wife; and, (5) the precise causal relationship, if any.[2] These unknowns make it impossible to assess what, if any, bearing, favorable or otherwise, such evidence would have at punishment.[3] *Compare with Ex parte Gonzalez*, 204 S.W.3d 391, 395-96 (Tex. Crim. App. 2006) (psychiatrist's diagnosis revealing PSTSD, ADD, personality disorder with explosive antisocial traits); *Ex parte Martinez*, 195 S.W.3d

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[2] The evidence here did little to add to the argument made by Appellant's counsel in support of the admissibility of evidence that Appellant had been sexually assaulted and bought that gun after he learned of his cousin's release from jail. 6 RR 155-61. The prosecutor's response at trial would apply equally today. "But why he has the gun is not [relevant], unless he's saying that somehow he pictured [his cousin] as [K.W's] face. But I mean, that's not what I hear . . . ." 6 RR 159.

[3] With respect to the guilt phase, establishing usefulness would seem to be an insurmountable task. In the past twenty years, there has been no case in which the prior sexual abuse of the defendant was found relevant to ascertaining guilt. Even Bernie Tiede. *Ex parte Tiede*, 448 S.W.3d at 460.

713, 721-22 (Tex. Crim. App. 2006) (statement of mental health expert in support of temporary insanity); *Ex parte Tiede*, 448 S.W.3d at 460 (Alcala, J., concurring) (Dr. Gripon's changed opinion about Tiede's culpability based on his recently revealed history of being a child sexual abuse victim).

2. Appellant's medical history is lacking.

Appellant complained that counsel failed to contact the facility where he was treated after the sexual abuse and the doctor who treated him after the murders, and that he failed to obtain his medical records. Again, there are no facts or data to evaluate. *Compare with Wiggins*, 539 U.S. at 534-38 (detailing the substantive mitigating evidence not presented at trial in assessing prejudice). Appellant made no effort to supply the same evidence he faults trial counsel for not obtaining. So how Appellant's psychological and psychiatric history is determinative to punishment is unknown. *Compare with Ex parte Imoudu*, 284 S.W.3d 866, 870-71 (Tex. Crim. App. 2009) (psychiatric testimony showed that the applicant had a viable insanity defense). No appellate court is authorized to conjure up a medical theory, for which it is unqualified to do, and hypothetically presume that Appellant suffers the most severe symptoms as a way to rationalize the beneficial nature of missing evidence. The court of appeals did so here.

3. The Hon. Buck Files' testimony is meaningless.

The Honorable Buck Files testified that counsel should have requested psychological and psychiatric testing to develop mitigating punishment evidence. An expert could have explained how the abuse affected his life and actions. Counsel, in Files' opinion, should have obtained a thorough history, and it appeared that counsel did no investigation into Appellant's history. According to *Wiggins*, 539 U.S. at 534-38, as a matter of best practice standards, Files is correct. However, the state of the evidence here does not make an evaluation by a reviewing court possible. Counsel's alleged failures and their consequences cannot be properly scrutinized or proven on a factually vacant record. *Cf. Ex parte Lahood*, 401 S.W.3d 45, 57 (Tex. Crim. App. 2013) (no affirmative evidence to satisfy either *Strickland* prong when the medical expert gave no examples of behavior showing incompetency). What *should* have been done by counsel to perform effectively is a non-starter because Appellant has not shown what *could* have been done.

4. Admissibility of Appellant's incomplete evidence is not established.

In addition to ineffective assistance jurisprudence, consideration of the rules of admissibility, which utilize some of the same principles, further illustrates why counsel cannot be found ineffective. To be admissible, "soft science" evidence must satisfy three conditions: qualification, reliability, and relevance. Specifically, it must

be shown that "(1) the witness qualifies as an expert by reason of his knowledge, skill, experience, training, or education; (2) the subject matter of the testimony is an appropriate one for expert testimony; and (3) admitting the expert testimony will actually assist the fact-finder in deciding the case." *Vela v. State*, 209 S.W.3d 128, 131 (Tex. Crim. App. 2006).

A. Qualification is not proven.

The proponent of scientific evidence bears the burden of proving that an expert is qualified. An expert must have "'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." *Id*. at 132 (quoting *Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 719 (Tex. 1998)). Second, qualification requires a showing of "fit." "Just as the subject matter of an expert's testimony should be tailored to the facts of a case, the expert's background must be tailored to the specific area of expertise in which the expert desires to testify." *Id*. at 133.

Here, Dr. French testified about his general education and experience and stated that he has qualified as a "mental health" expert in East and Northeast Texas courts. 8 RR 12-13. Though informative, it is not known whether his expertise "fits" this case. Does his particular area of expertise include connecting or explaining a

person's past sex abuse trauma with the commission of a later, seemingly unrelated murder? *Cf. Vela*, 209 S.W.3d at 135 ("To qualify a witness as an expert by practical experience alone, a trial judge must fully explore that witness's experience in the particular field in which the witness intends to give an expert opinion. A cursory reference to the witness's credentials is insufficient to support expert status."). Having been an approved expert in other courts in other cases does not give Dr. French an "expert" seal of approval for all issues bearing on mental health generally or, most importantly, on Appellant. More information is needed.

B. Reliability is not proven.

Reliability requires a showing that the science is based on "sound scientific methodology." As stated in *Kelly v. State*, the following principles govern reliability: "(a) the underlying scientific theory must be valid; (b) the technique applying the theory must be valid; and (c) the technique must have been properly applied on the occasion in question." 824 S.W.2d 568, 573 (Tex. Crim. App. 1992). Factors that may be considered include:

> (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community, if such a community can be ascertained; (2) the qualifications of the experts testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory

> and technique can be explained to the court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.

Id.

Here, none of the reliability factors have been satisfied. As with Appellant's failure to prove Dr. French's qualification, the record also does not show that the science and technique applying it are valid. And because his testimony did not include anything specific to Appellant, it is impossible to assess whether the technique was properly applied. Once again Appellant failed to meet his burden as the proponent of Dr. French's testimony.

C. Relevancy is not proven.

"The expert must make an effort to tie pertinent facts of the case to the scientific principles which are the subject of his testimony. Establishing this connection is not so much a matter of proof, however, as a matter of application." *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996). It is once again impossible to ascertain the relevancy of Dr. French's testimony because he failed to "tie" his sexual-abuse-trauma mitigation theory to Appellant. *See, e.g., Williams v. State*, 895 S.W.2d 363, 366 (Tex. Crim. App. 1994) ("generic testimony" not applied to the facts of the case). Finally, what relevance, even in the most general sense, Appellant's medical records have is completely unknown.

The deficiencies in Appellant's claim, as shown by ineffective assistance precedent, are compounded by Appellant's inability to show that Dr. French's testimony would have been admissible. Counsel cannot be faulted when Appellant has not provided a foundation from which his performance should be judged.

5. Conclusion

Counsel should not be held ineffective on an undeveloped record. The serious consequences attached to unjustly holding counsel ineffective provide good reason for this Court to use this as an opportunity to provide a comprehensive analysis of the law for the benefit of lower courts. Lower courts need better guidance about the applicable burden and evidentiary standards for purposes of motion for new trial proceedings.[4]

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[4] This need is evidenced by another ineffective assistance case before this Court. In *Prine v. State*, PD-1180-16 (submitted 2-7-17), the Court will address two issues:

1. When the record is silent as to defense counsel's reasons for calling witnesses in support of jury-ordered probation, has the presumption of reasonable strategy been rebutted?
2. If the reasonableness presumption was rebutted, did defense counsel render ineffective assistance in calling witnesses who presented favorable evidence but also opened the door for damaging evidence?

PRAYER FOR RELIEF

The court of appeals' decision should be reversed, and Appellant's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,067, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on June 8, 2017, via email or certified electronic service provider to:

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